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HAROLD B. WILLEY,

No. 481

IN THE

Supreme Court of the United States

October Term, 1953

FLORIDA CITRUS COMMISSION, *et al., Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al., Appellees.*

Appeal from the United States District Court for the Southern District of Florida

REPLY BRIEF FOR THE APPELLANTS

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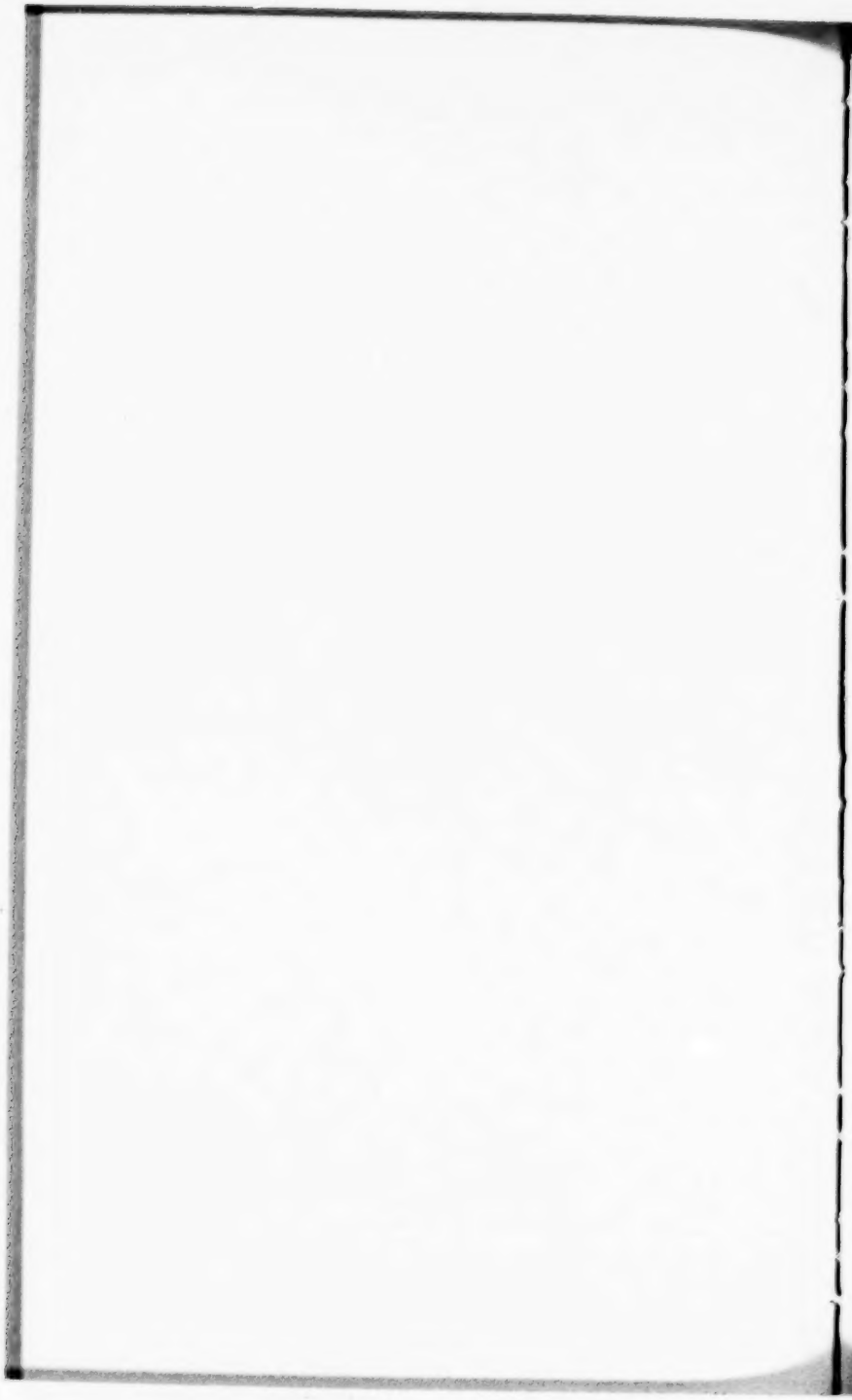

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REPLY BRIEF FOR THE APPELLANTS

This reply brief is filed in order to emphasize the failure of the briefs filed by appellees, Interstate Commerce Commission and the railroads, to meet the issues presented. Both of appellees' briefs fail to come to grips with the findings of fact made by the Commission in its final report.

In its final report after rehearing and further hearing the Commission found that the charge in issue is a charge "for making delivery." Appellees simply ignore this find-

ing and would have the Court ignore it. Appellees' briefs also include other basic errors, including primary reliance upon cases dealing with "accessorial" unloading service which is entirely irrelevant to the present case which deals with an unloading service which is an integral and essential part of the railroads' performance of their legal duty to make delivery under their line-haul rates.

The brief for railroad appellees would have the Court understand that delivery of the fruit and vegetable traffic at the railroad pier stations in New York is more expensive than conventional team-track delivery would be. In contrast, the brief for the Commission frankly acknowledges and quotes the Commission's finding that pier station delivery is more economical for the railroads than team-track delivery would be.

We find in both the Commission's brief and in the railroad's brief a primary reliance upon conclusions stated by the Commission in its original report which were abandoned and reversed by the Commission after rehearing and further hearing. We rest our case upon the findings of fact made by the Commission in its final report after rehearing and further hearing. Appellees have been unable to do this.

We shall discuss briefly below certain of the basic errors upon which appellees' briefs rest:

Appellees' briefs ignore the basic findings by the Commission that the charge in issue is "for making delivery."

We have for convenience collected in Appendix A hereto the Commission's findings of fact that the so-called "unloading" charge is *for making delivery.* The findings are clear and emphatic. Appellees have been unwilling or unable to deal squarely or frankly with these findings. They have found it necessary to present their arguments as though no such findings had been made, although these findings are the most fundamental determinations made by the Commission. Acknowledging as they do the legal obligation of the railroads to make delivery under their

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line-haul rates,* appellees have been forced to argue as though no such findings were made.

The greater economy of pier station delivery at New York is conceded by the Commission.

In railroad appellees' brief, commencing on page 9, is the following statement: "The cost to the carriers of delivery on team tracks is of course substantially less than the cost of delivery at the pier stations when unloading at the pier stations is included." This statement completely disregards the specific findings of the Commission to the contrary. Specifically, the Commission found: "On the record in this proceeding it is apparent that pier station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track delivery." (R. 23r)

Indeed, on page 17 of the brief of the Commission it is conceded that the position of the railroad appellees is not supported by the record. It is there said: "Contrasting pier station with team-track delivery, the Commission found that 'the most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee' (R. 23m)."

The railroads do not provide adequate team-track delivery facilities at New York.

Since the latter part of the 19th century the railroads have concentrated their New York deliveries of fresh fruits and vegetables at pier stations voluntarily established and maintained by them for the delivery of this traffic. Approximately 90 percent of the fresh fruit and vegetable traffic delivered at these pier stations is delivered by the

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* Brief of railroad-appellees, p. 55: "There is no dispute that the transportation duty of the carriers under the line-haul rates covers delivery."

Erie Railroad and the Pennsylvania Railroad. The railroad appellees in their brief would have the Court believe that adequate team-track facilities are provided by the railroads in New York. The Commission findings, and the statements of fact in the Commission's brief, are directly to the contrary. The railroads urged in the Commission proceeding that their team-track facilities at New York were adequate but the Commission found as follows:

> "The record establishes, however, that only a relatively small part of the total volume of such traffic can be accomodated on the existing team tracks in Manhattan." (R. 23o)

The Commission in its brief herein states (p. 17):

> "Team-track facilities on Manhattan Island are inadequate to accommodate more than a relatively small part of the total volume of fruit and vegetable traffic consigned to New York City (R. 24h), and it would be impracticable, if not impossible, to expand those facilities to the extent necessary to accord such delivery to all of the traffic (R. 23n)."

The Commission found that the manner of terminal handling of fruit and vegetable traffic is "identical" with that on other traffic.

In an effort to restrict and limit the Commission's findings in its final report, made in 1952, and to escape from these findings made by the Commission after rehearing and further hearing, appellees in their briefs disregard these findings and instead of dealing with them, or meeting them, seek to rely upon quotations of statements found in the Commission's prior report made in 1948. They do this as to "delivery" and also on the issue of discrimination against the fruit and vegetable traffic compared with all other traffic.

In the 1952 final report the Commission found that the terminal handling and delivery of fresh fruit and vegetable traffic is "identical" with the manner of terminal handling and delivery of all other freight at these pier stations.

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(R. 23f) In an effort to limit this 1952 finding, railroad appellees say:

> "The finding is, however, limited to the physical facts of car-floating and unloading . . . " (B., p. 71, footnote)

Similarly, the Commission in its brief erroneously infers that it was found that there is a difference in the terminal handling of fruits and vegetables, on the one hand, and general traffic, on the other hand, at the New York pier stations. (B., p. 52) The Commission likewise cites and relies upon the prior report of the Commission made in 1948 instead of on the contrary finding in the Commission's final report after rehearing and further hearing.

The Commission's specific finding in its final report that the terminal handling and unloading is "identical," made in 1952, reads as follows:

> "As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are car-floated and unloaded." (R. 23f)

The Commission's final report in 1952 on "Rehearing" reversed and abandoned the grounds of decision in the 1948 report.

In our original brief (pp. 26-31, 50-54) we showed that the Commission in its final report, following rehearing and further hearing, reversed and abandoned the grounds of decision in its 1948 report. Railroad-appellees in their brief (p. 37) contend that all conclusions and grounds of decision given in the 1948 report should be considered as supporting the Commission's final 1952 decision. Railroad-appellees argue that the 1952 report is merely "supplemental". This argument entirely overlooks the obvious fact that in the two reports the Commission reached substantially different conclusions, made different findings of fact, and advanced different reasons and grounds of de-

cision therein. The final report entered in 1952 after rehearing and further hearing is not a mere abbreviature of the 1948 report. The 1952 report is substantially longer than the 1948 report and the reasons and grounds assigned by the Commission for its final decision are fully and plainly stated in the 1952 report under the heading "General discussion and conclusions." (R. 23y-23cc)

We shall not repeat our showing made in the original brief that the Commission did in its 1952 report reverse and abandon the principal reasons and grounds of decision given in the 1948 report. However, for convenience we have prepared Appendix B attached hereto which compares in tabular form statements and actions in the 1948 report with those in the 1952 report. It will be seen from this appendix that the 1952 report plainly reversed and abandoned the ground of decision underlying the 1948 report.

The line-haul rates prior to and at the time of this proceeding included compensation for unloading, i.e., delivering the freight.

The Commission states in its brief (p. 29) at the outset of its argument, that the "principal issue presented to the Court for decision" is whether the unloading charges "represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line haul rates." The Commission, in its brief, asserts (pp. 39-40) that the Commission concluded that "the unloading service performed by the carriers was not a part of the transportation service required of them under the line haul rates," and then the Commission declares, in its brief, that "whether or not such a finding was made or may be inferred from the Commission's other findings and conclusions, no such specific finding was required as a basis for the Commission's order."[1]

[1] If no finding is required by the Commission as to what it calls the "principal issue" then undoubtedly no finding is required on the other issues. It is certainly strange and novel doctrine that the Commission may issue an order, based on thousands of pages of testimony and exhibits about matters of rate-making, but is not

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The Commission made no such finding, and the record contains no evidence to warrant any such finding. Significantly, the Commission's brief does not quote the finding which it argues was made, does not cite or refer to the record in this respect, and does not cite or refer to any evidence in the record in support of such finding if the finding was made.

The brief for the railroads asserts (p. 41, footnote) that "there was evidence that the level of the line-haul rates in the past did not depend upon whether the unloading service was performed," but the railroads' brief contains only one citation or reference to the record in support of that allegation, *i.e.*, the brief states on pp. 48-49 that Exhibit 4 in the unprinted record supports the argument that the line-haul rates have not included compensation for unloading at the New York piers and at the produce terminal platforms in Philadelphia. An inspection of that exhibit compels the conclusion that it is entirely irrelevant as a support for the railroads' argument. That exhibit merely discloses rates for shipments to points within a wide geographical area around both New York and Philadelphia, and the exhibit does not say that the line-haul rates in question do not include compensation to the carriers for unloading, *i.e.*, delivering the freight.

The record contains no evidence and the Commission made no finding that the line-haul rates have not included compensation for unloading, *i.e.*, delivering the freight at the New York piers and at the produce terminal platforms in Philadelphia. Contrariwise, the Commission found that the unloading prior to this proceeding "was performed by the carriers without charge therefor *other than the line-haul rate*" (R. 23r; 286 I. C. C. 119; emphasis supplied), and "this method of unloading had been performed by the

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required to make any findings. This Court has made it plain again and again that adequate findings must be made. *Automatic Canteen Co.* v. *Federal Trade Comm.*, 346 U. S. 61, 81; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-489; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-202.

carriers prior to November 1, 1948, without charge therefor *other than the line haul rate*". (R. 23t; 286 I. C. C. 119, 135; emphasis supplied) The Commission found that prior to November 1, 1948, there were no separate charges in addition to the through rates for unloading fruits, vegetables, or other descriptions of traffic at the stations specified. (R. 23c; 286 I. C. C. 119, 121) And specifically the Commission found in its prior report—which is expressly relied on by the railroads in their brief—that "various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, *including unloading,* could *not* have been ignored in determining the line-haul rates". (R. 24q; 272 I. C. C. 648, 662; emphasis supplied)

Again and again the Commission has found that the line-haul rates for shipments to the New York piers and to the produce terminal platforms in Philadelphia have included and do include compensation to the carriers for unloading the freight. These numerous examples are not "occasional and ancient instances" as asserted in the railroads' brief, pp. 47-48. During the very period of the hearing involved in this appeal the Commission found, in 1947, that the line-haul rates on shipments of vegetables and avocados from the South to New York should be increased because of the expenses incident to delivering the freight at the New York piers. *Vegetables and Avocados from the South to Official Territory,* 269 I. C. C. 409, 410. The evidence in that proceeding, with respect to the magnitude of the terminal operations at the New York piers, emphasizes the expense of unloading.[2] There is nothing "ancient" about that finding by the Commission, and neither is it an isolated action by the Commission.

The railroads' brief fails to consider the many instances cited at length in the brief, on behalf of the Secretary of

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[2] See Vol. 2, pp. 88-91, 94-95, and 117 in Investigation, and Suspension Docket No. 5478, on file in the Interstate Commerce Commission. This material may clearly be considered in this proceeding. *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 530.

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Agriculture in No. 480 (see pp. 37-44 thereof) in which the Commission has repeatedly found over a period of 25 years preceding this proceeding that the line-haul rates include compensation to the carriers for unloading the freight at these stations. There can be no doubt of the plain and emphatic character of these findings again and again by the Commission. There can be no doubt in this proceeding that the Commission found in its first report—which is so emphatically relied on in the briefs of the railroads and the Commission—that the "various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line haul rates". (R. 24q; 272 I. C. C. 648, 662) There can be no doubt that the record in this proceeding contains no evidence which would have warranted the Commission in making a finding to the contrary. The Commission's brief states at the outset (p. 29) that "the principal issue" relates to whether the railroads are receiving duplicate payment for the same service because the line-haul rates already include compensation for unloading, *i.e.*, delivering the freight. The railroads' brief (p. 36) also states that this is a principal issue in the case. But the railroads' brief is clearly wrong, however, in its assertion (pp. 37-38) that the appellants "rely almost altogether upon one circumstance, *i.e.*, that for many years the carriers had performed the unloading services at the pier stations on Manhattan Island and at the produce terminals at Philadelphia without imposing a separate charge." The appellants do rely upon that circumstance, but it is by no means "a reliance almost altogether upon one circumstance." There are other circumstances of compelling character on which the appellants' briefs place definite and unequivocal reliance. The Commission and the railroads are unable to rely to those other facts and circumstances, and the railroads have chosen to say, incorrectly, in their brief that our reliance is "almost altogether upon one circumstance."

The railroads argue (pp. 53-54) that the cases cited by the appellants, "in which carriers making delivery at New York have urged the additional expense to them of terminal service in support of their division claims against other carriers," are irrelevant inasmuch as the "issues as to the propriety of the division of revenue among carriers have little relevancy to the issues as to whether charges to shippers are just and reasonable." But the significant fact is that consideration of the unloading costs in determining the divisions of rates is recognition that the line-haul rates include compensation for unloading. A carrier "is entitled to receive by way of divisions only its just and equitable share of the proceeds of the joint rail transportation service rendered, it cannot claim as a part of its share the costs of a service which is not a part of the rail service called for by the joint rates." *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, 379.

The principal cases cited by appellees do not support their arguments.

The appellees rely upon *Swift & Co.* v. *United States*, 316 U. S. 216, *Barringer & Co.* v. *United States*, 319 U. S. 1, and *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, in support of their position that separate charges, in addition to the line-haul rates, can be established for unloading fresh fruits and vegetables at the New York piers and at the Philadelphia platforms.* But none of those cases support the appellees' position that a separate charge can be established for unloading where, as here, the unloading is an essential part of delivery. The transportation service involved in the *Swift* case ended when the livestock was unloaded into the unloading pens and, therefore, this Court held that the Commission was not required to investigate into the practices of the stockyards in charging for stockyard services performed after delivery. (316 U. S., pp.

* See Commission's Br., pp. 36-41; Railroads' Br., pp. 24, 29, 30, 43, 50, 51, 56, 62.

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230-231) In the *Smelting Company* case, the Commission's finding as to where the line-haul service ended was sustained and, therefore, the Court upheld the Commission's decision that additional charges must be made for services performed in addition to delivery. (329 U.S. 186)* Similarly, the *Barringer* case involved "the cost of the through haul" inclusive of a loading service which, under the facts of the case, was an "accessorial service." (319 U. S., p. 9) Hence, none of these decisions supports the proposition that a separate charge can be imposed for making delivery.

The decision by this Court in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, relied upon by the Commission (Br., pp. 38-39) and the railroads (Br., pp. 38-40), lends no support to the appellees. The terminal charges involved in that case applied only at a point beyond the lines of the line-haul carriers. The carriers made delivery at their terminals under their line-haul rates, but added a $2 per car charge for delivery by another carrier off line. (215 U. S., pp. 107-108) Hence the *Stickney* case is sharply distinguishable on its facts. Also, that decision was rendered in 1909 prior to significant amendments to the Interstate Commerce Act. The Interstate Commerce Act was amended by the Act of June 18, 1910, which added the requirement that at any hearing involving a rate increase after January 1, 1910, the "burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *." (36 Stat. 539, 552, as amended; 49 U. S. C. § 15(7))** Hence, even assuming, *arguendo*, that the rule in the *Stickney* case would be applicable to a delivery by line-haul carriers at their own terminals, nonethe-

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* See appellant's Br. in No. 480, pp. 58-59.

** The purpose of this amendment to the Interstate Commerce Act was to shift the burden of proof from the shipper to the carrier. 45 Cong. Rec. Part 7, p. 7374 (item 18).

less the carriers are now required to sustain the burden of proof that a changed rate is just and reasonable. This burden cannot be met, when the line-haul rates include delivery, without a showing by the carriers that the line-haul rates do not adequately compensate the carriers for making delivery. (See appellant's Br. in No. 480, pp. 36-53, 63-77; appellants' Br. in No. 481, pp. 25-26, 31-45.)

The railroads further contend (Br., pp. 50-51) that if the line-haul rates are unreasonable considering the transportation service now covered by the line-haul rates, the shippers may be heard upon the reasonableness of the line-haul rates in another proceeding, citing *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 198. But the *Smelting Company* case involved a proceeding to determine where the line-haul service ended—as distinguished from a rate proceeding. The basis for the Court's opinion, in this respect, is that in a proceeding to determine where a line-haul rate ends, the Commission has "authority to exclude rate questions * * *." (339 U. S., p. 198) But certainly the Commission does not have authority to exclude rate questions from a rate proceeding. In the case at bar, the railroads must sustain the burden of proof that their proposed rates are just and reasonable. This necessarily involves a consideration of the line-haul rates. (See appellant's Br. in No. 480, pp. 36-53, 63-77; appellants' Br. in No. 481, pp. 31-45).

The appellees also rely on certain decisions of the Commission in which the Commission approved separate charges in addition to the line-haul rates, *i.e., Wholesale Fruit & Produce Asso.* v. *A., T. & S. F. Ry. Co.*, 14 I. C. C. 410; *New England Coal & Coke Co.* v. *N. & W. Ry. Co.*, 33 I. C. C. 276; *Loading and Unloading Carload Freight*, 101 I. C. C. 394; *Charges for Protective Service to Perishable Freight*, 241 I. C. C. 503; *Charges for Loading and Unloading Carload Freight*, 269 I. C. C. 25; *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I. C. C. 481. But none of those decisions is relevant here. The *Wholesale Fruit and Produce* case related to unloading which was,

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under the facts of the case, an accessorial service. The *New England Coal and Coke* case involved a separate charge for "dumping" coal from the carrier's cars into vessels. Also, the aggregate of the line-haul rate plus the dumping charge was less than the line-haul rate for team-track delivery. (See appellants' Br. in No. 481, pp. 60-61) The unloading involved in *Loading and Unloading Carload Freight,* 101 I. C. C. 394, was in addition to delivery and also, the Commission found that "the general measure of the rates to and from the points in question are not unreasonable for the line-haul service alone." (101 I. C. C. at p. 413)* In the subsequent proceeding, *Charges for Loading and Unloading Carload Freight,* 269 I. C. C. 25, the Commission specifically referred to the "unloading" charges as charges for "accessorial services." (269 I. C. C., p. 25) Similarly the Commission's approval of unloading charges in *National Carloading Corp.* v. *Pennsylvania,* 288 I. C. C. 481, related to tariffs providing that the separate charges would be imposed only when the carriers were requested by the shippers to unload the freight. (288 I. C. C., p. 482) The Commission's approval of separate refrigeration charges in *Charges for Protective Service to Perishable Freight,* 241 I. C. C. 503, also related to accessorial services.

Manifestly, the prior decisions of the Commission relied upon by the appellees are not in point in this proceeding. The Commission has approved, in this proceeding, separate charges for making delivery without determining that the line-haul rates are inadequate to compensate the carriers for making delivery and without determining that the aggregate of the line-haul rates plus the delivery charges are just and reasonable.

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* Commissioner Campbell dissented in that case on the ground that "I am not convinced that the respondents have justified the reasonableness of the existing rates to cover merely the line-haul service." (101 I. C. C., p. 414)

CONCLUSION

In various respects the briefs filed by the Commission and the railroads are manifestly inaccurate, and also fail to deal with the issues in this case. This reply brief would be lengthy indeed if all of those inaccuracies were itemized or all those irrelevancies dealt with. Hence, this reply brief merely mentions, in brief compass, some of the many instances in which the arguments in the briefs of the Commission and the railroads are clearly fallacious.

The judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A.

The Findings as to "Delivery."

For convenient reference we quote below the Commission's findings in its final report "on Rehearing and Further Hearing", *Unloading Charges on Fruits and Vegetables at New York and Philadelphia,* 286 I. C. C. 119 (R. 23, *et seq.*), that the charge in issue is a charge for delivery. Throughout the findings of fact in its final report the Commission describes the service involved as being a delivery service, the word "delivery" occurring several times on almost every page of the final decision. The constant repetition of the word "delivery" in the Commission's final decision is indicated by the quotations shown below from the Commission's report.

From the Commission's final report: *

> "Respondents [the railroads] do not accord the consignee the option of performing the unloading. Under their proposal the line-haul rate will apply only to the New York piers, *with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery.*" (R. 23e)

> "Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, *for making delivery* at New York piers." (R. 23m)

> "The pier floor is the first place where, after the freight has been unloaded, *delivery* can be taken." (R. 23g)

> "After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away." (R. 23k)

> "In fact, *delivery* could not be accomplished without first unloading the freight." (R. 23r)

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* Italics supplied.

"This *method of delivery* has been utilized by the Erie for more than 60 years." (R. 23i)

"The costs per car shown by respondents *for delivery* of fruits and vegetables at Jersey City and New York are: * * * [The Commission then gives in detail the cost figures submitted by the individual railroads, noting in certain cases that these costs *for delivery* include unloading.]" (R. 23o)

"The costs per car shown by respondents *for delivery* of fruits and vegetables at Philadelphia are: * * * on team tracks, and * * * at the auction-sales platform; * * * on team tracks, and * * * for *station platform delivery.*" (R. 23o-23p)

The constant repetition of the word "delivery" throughout the Commission's final report is evidenced by the following quotations of phrases from that report:

From R. 23d:

"Carriers performing *deliveries* . . . "
"the conditions governing *delivery* of the traffic . . . "

From R. 23e:

"is *delivered* at the pier stations".
"the *deliveries*".
"The railroads established their *delivery* terminals on the water front . . . and have concentrated their fruit and vegetable *deliveries* in this area. "
"fruits and vegetables *delivered.*"
"an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept *delivery.*"

From R. 23f:

"for the *delivery* of freight . . . "
"fruits and vegetables *delivered* . . . "

From R. 23g:

"is unloaded by the carrier and placed on the pier platform for *delivery* to the consignee . . . "
"where *delivery* is completed . . . "

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"In no other manner could these commodities be unloaded and *delivered* to consignees in the short space of time available."
". . . they are not permitted to take *delivery* of their freight from that facility (car float). The pier floor is the first place where, after the freight has been unloaded, *delivery* can be taken."

From R. 23h:

"In taking pier station *delivery*, . . . "
"The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and *delivery* of carload freight in packages."
". . . the receipt and *delivery* of perishable freight."
"taking *delivery*."

From R. 23i:

"*deliveries* of fresh fruits and vegetables to the New York piers . . . "
"*delivered* at those piers . . . "
"*deliveries* by car float at the New York piers . . . "
"team-track *deliveries*"
"team-track *delivery*"
"pier-station *delivery*"
"team-track *delivery*"
"This method of *delivery* has been utilized by the Erie for more than 60 years."

From R. 23k:

"After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away."
"accept *delivery* at team tracks"
"The Pennsylvania prefers to *deliver* at Jersey City team-track yards, rather than at New York piers, shipments of fruits and vegetables consigned to New York. *Deliveries* at these facilities . . . "
"the *delivery* of fruits and vegetables . . ."

From R. 23l:

"pier stations where fruits and vegetables consigned to New York are *delivered*"
"their *deliveries*"

"*deliveries*"
"accept *delivery*"
"scope of *delivery*"
"unloading and *delivery* of traffic . . ."

From R. 23m:

"*delivery* of the traffic"
"by making *delivery*"
"for making *delivery* at New York piers."
"accept *delivery*"

From R. 23n:

"the system of *delivery* by car float to pier station, and unloading of the cars to the station platforms as a part of the transportation."
"The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for *delivery* to the consignee."
"team-track *delivery*"
"team-track *delivery*"

From R. 23o:

"*delivery* of the fruit and vegetable traffic."
"Manhattan *delivery*."
"The costs per car shown by respondents for *delivery* of fruits and vegetables . . . (not including unloading) . . . (including unloading) . . . (including unloading)"
"The costs per car shown by respondents for *delivery* . . ."

From R. 23p:

"station platform *delivery*"
"railroad *deliveries* of fresh fruits and vegetables"

From R. 23q:

"The costs per car . . . shown by the Pennsylvania for *delivering* and unloading fruits and vegetables at piers . . . and . . . by the Erie for *delivering* like traffic at Duane Street piers, . . ."
"The estimated costs per car of team-track *deliveries* in Manhattan . . . would exceed the cost of *delivery* at piers . . . "

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"The cost . . . for *delivering* and unloading at Duane Street piers would be less than the protestants' estimated cost of expanded team-track *delivery* . . ."
"expense as chargeable to unloading and *delivery.*"

From R. 23r:

"pier station *deliveries*"
"pier-station *deliveries* in Manhattan . . ."
"team-track *deliveries*"
"pier *delivery*"
"In fact, *delivery* could not be accomplished without first unloading the freight."

From R. 23s:

"take *delivery* of the freight at that point."

From R. 23t:

"cars *delivered* on team tracks"
"*delivered* on the terminal platform"

From R. 23v:

"platform *delivery*"

From R. 23y:

"team-track *delivery*"
"*delivery* on the terminal platforms"
"team-track *delivery*"

From R. 23bb:

"pier *deliveries*"
"Pier *deliveries* permit expeditious handling of cars without switching expense on Manahattan."

APPENDIX B.

A tabulation comparing statements and actions in the two Commission reports showing that the May 7, 1952 Report (286 I. C. C. 119) reversed the October 4, 1948 Report (272 I. C. C. 648) and abandoned the grounds of decision therein.

"Prior 1948 Report	*May 7, 1952*
1. "We find that the schedules under investigation are just and reasonable." (R. 24r)	1. (a) ". . . we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, . . ." (R. 23bb)
	(b) ". . . The schedules naming the assailed unloading charges will be ordered canceled . . . " (R. 23bb)
2. "Report of the Commission." (R. 24)	2. (a) "Report of the Commission on *Rehearing* and Further Hearing." (R. 23)
	(b) Concurring opinion: ". . . it reverses the prior report . . ." (R. 23cc)
3. "Circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables." (R. 24r)	3. "As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is *identical* with the manner in which fruits and vegetables are carfloated and unloaded." (R. 23f)

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4. "No studies have been made concerning these switching costs or of the savings from more effective utilization of equipment as the result of pier delivery. In any event it is not appropriate to consider these matters as affecting the costs, as such, of unloading at the piers." (R. 24o)

4. "Subsequently it appearing, upon further consideration by us, that the record was deficient in respect of certain evidence which seemed to be important," ["The difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team - tracks", etc. Notice of Oct. 10, 1950] "the proceeding by notice dated October 10, 1950, was assigned for further hearing for the introduction of additional evidence into the record." (R. 23a)

* * *

"On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track de-

liveries, and that the difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities disfavors the investments that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs, incident to operation of such expanded facilities." (R. 23r)

5. "Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates." (R. 24q)

"For the purpose of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates." (R. 29q)

5. (a) Not repeated in 1952 Report.

(b) 1952 Report (as elsewhere shown) contains definite findings that charges are for making delivery.

(c) Sec. 15(7) does not require shippers to "convince" the Commission of unlawfulness of new charges, but in terms places burden of proof on the carriers "to show that the proposed changed" charge "is just and reasonable."

(d) The quoted 1948 conclusions were specif-

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	ically challenged by the petitions for rehearing, and the Commission receded therefrom by granting the petitions and ordering that the proceeding be "reopened."
	(c) The universal rule requires delivery under the line-haul rates.
6. "Such charges are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published." (R. 24q)	6. (a) See Item 5 above; all those statements apply equally here.
	(b) Accessorial services, in addition to line-haul transportation, are performed by carriers and available to shippers, when requested by shippers.
	(c) "In fact, delivery could not be accomplished without first unloading the freight." (R. 23r)
7. "The relative level of the rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading." (R. 24q)	7. (a) See Item 5 above; all those statements also apply here.
	(b) "The Pennsylvania publishes specific charges for unloading carloads of fresh fruits and vegetables at Baltimore, Pittsburgh, and Chicago. The *consignees are,* however, *permitted to perform such unloading* at these points . . . All shipments of

fruits and vegetables consigned to those markets are unloaded by the consignees, *except when they request the carrier to perform that service.*" (R. 23w)

* * *

"The fruit and vegetable terminals and the unloading operations at Baltimore, Pittsburgh, and Chicago, as indicated, are not comparable with those at Philadelphia." (R. 23x)

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